

1 The Honorable Robert S. Lasnik
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1 auditor Victoria Kitts to answer the questions she could not answer in the deposition excerpts
 2 identified as Exhibit H to the supporting declaration of Scott B. Henrie (Dkt. #187).

3 **II. FACTUAL BACKGROUND**

4 **A. Clark Nuber**

5 The Court's Order of April 6th, 2016¹ compels Clark Nuber to "immediately make the
 6 native format files available to all parties, at no cost." Clark Nuber, claims in its opposition
 7 that the files were available during discovery depositions of their witnesses "until at least June
 8 30, 2016."² This is news to Plaintiff's counsel since the email offering the materials dated
 9 April 6th, 2016 states that the materials would only be available for one week. To say now in
 10 response to a motion to compel that at all times during depositions these materials were
 11 available is a bit of mischaracterization since Plaintiff was not aware of this availability. Nor
 12 were these materials ever offered to solve the problems witnesses purported to be having in
 13 answering the questions. Clark Nuber also falsely claims that Plaintiff provided none of the
 14 transcripts of their witnesses to the Court when 23 pages of Ms. Kitts testimony, in which she
 15 professes to be unable to answer without reviewing the complete audit file, are attached as
 16 Exhibit H to the declaration in support of the Motion to Compel.³ Moreover, Ms. Kitts
 17 testified that she had reviewed the audit files digitally stating "it's within our audit software. .
 18"⁴ Ms. Kitts later explained: "I don't know what was provided to you. I never saw the form
 19 of that. We work within auditing software, which does not have a - - it doesn't work in the
 20 way that I believe you are looking at this."⁵ Ms. Kitts also could not tell whether "paper"
 21 records were authentic: She testified for example: "I can't be confident in that. They appear to
 22 be, they seem familiar, but without having the audit software."⁶

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24 ¹ Dkt. #80.

25 ² Dkt #226 p. 3:15

26 ³ Ex. H to Henrie Declaration, DKT #187 p. 61-83.

⁴ Dkt # 187 p:71 :1-7.

⁵ Dkt # 187 p. 78:18-21.

⁶ Id. at p. 78: 22- 79 :3.

1 There are too many mischaracterizations of the facts concerning Clark Nuber's
 2 discovery conduct in Clark Nuber's opposition materials to fully address in this reply. But it
 3 should be said that Plaintiff did not oppose the production of the records in their native format
 4 in April of this year. What Plaintiff opposed was Clark Nuber's belated effort to extend the
 5 deadline for expert witness reports when Plaintiff's own experts had already been forced to
 6 wade through Clark Nuber's document dump of materials in order to timely prepare their own
 7 reports. A task that Clark Nuber's experts stated under oath was an "impossible"⁷ task" given
 8 the voluminous nature of the materials. But what was then "impossible" has now been
 9 downgraded by Clark Nuber in response to Plaintiff's motion to compel to: "some of the PDF
 10 copies were difficult to follow, especially the PDF copies of Excel spreadsheets in the
 11 document production."⁸

12 Clark Nuber now argues that what its own experts once said in order to gain a deadline
 13 extension is irrelevant since the entire audit file is not necessary for the witnesses to answer
 14 deposition questions. Rather Clark Nuber identifies a subset of the audit file which Clark
 15 Nuber claims is all that is needed for their witnesses to testify. Clark Nuber identifies this
 16 subset vaguely as:

17 [T]hey just needed paper copies of the essential and relevant work papers for
 18 reference when trying to answer some deposition questions they were asked but
 19 they were quite consistently not provided those paper copies in their
 20 depositions.⁹
 21 Moreover, the actual volume of this subset is in Clark Nuber's own words: "not that great."¹⁰
 22 The only remaining problem is that while Clark Nuber is apparently aware of what are the
 23 essential and relevant work papers, Plaintiff's counsel has no means of identifying this

24 ⁷ Docket 70 p. 2:17-19. "Clark Nuber and its experts have found the volume of data, particularly printed
 25 documents, to be so great as to make it impossible to prepare themselves to present their expert opinions to the
 26 court." "Emphasis added"

27 ⁸ Dkt. #226 p. 2:21-22.

28 ⁹ Dkt #226 p. 6 :10-13

29 ¹⁰ Dkt. #226 p. 6 :13-15

1 important subset of materials and separating those materials from the materials that are
 2 otherwise voluminous and impossible to work with.

3 Suffice it to say, that Plaintiff is unaware of where this important subset begins and
 4 ends. A simple solution to the discovery dilemma is that Clark Nuber be ordered to produce
 5 each of the subsets for each of the three audits which are necessary for Ms. Lees to answer
 6 questions in deposition. Often even if a specific work paper is identified, the authenticity or
 7 source of the paper document is questionable and the information requested is unascertainable.
 8 Having Clark Nuber identify and produce the “essential and necessary work papers subset”
 9 would also help to eliminate uncertainty by the witness as to the authenticity of the records. (“I
 10 can’t answer that based on excerpts from a memo that appear to come from the 2010 audit
 11 work papers. Our audit work papers are not designed to work alone.”)¹¹. The Trustee requests
 12 that the Court order Clark Nuber to identify and provide these materials as quickly as possible
 13 and well before the deposition of Ms. Lee, so that counsel may review them and prepare for the
 14 deposition of Joyce Lee. Clark Nuber does not oppose producing this witness.

15 Since they have already selected and shown at least one of these subsets of each audit to
 16 Ms. Kitts it should not be much of a burden to provide such information to all counsel so that
 17 discovery may properly and efficiently be obtained during deposition. Ms. Lee is now
 18 apparently available for her deposition.

19 Clark Nuber also questions the scope of the motion. Plaintiff may have been remiss to
 20 not also specifically request that the Court also require Ms. Kitts to answer those questions she
 21 was unable to answer during her deposition once the workable subset of “relevant work paper
 22 records” are made available for depositions. Ms. Kitts deposition should also be allowed
 23 specifically on those questions she could not answer that are reflected in Exhibit H to the
 24 supporting declaration of Scott B. Henrie.

25
 26 ¹¹ Excerpts from Deposition of Victoria Kitts attached as Exhibit H to Supporting Declaration of Scott B. Henrie.
 27 at p. 178:13-21 and p. 196:12-15.

1 **B. The Paton Defendants**

2 As to the Paton defendants (“Paton”), the Complaint includes a fraudulent transfer
 3 claim under RCW 19.40 et seq. Thus the timing, extent and details of transfers to the
 4 Shirehaven Trust are directly in issue as would be other similar efforts to transfer assets in
 5 order to place those assets beyond the reach of creditors.

6 Paton’s response in opposition to these discovery requests is that discovery directed
 7 toward this claim is a fishing expedition effort and improper discovery of Paton’s ability to
 8 satisfy a potential judgment. Paton’s objections should be overruled. The issues raised by the
 9 fraudulent transfer claims and the discovery sought are completely within the scope of the
 10 claims alleged in the Complaint. Paton should be compelled to produce the requested
 11 information. If such responses lead to the discovery that Paton has already transferred all his
 12 assets and has no remaining ability to satisfy a judgment against him, those claims will be
 13 validly asserted. Paton’s objections that discovery may reveal such facts is not a reason to
 14 precluded such discovery.

15 In addition, the extent of Mr. Paton’s involvement at and control of Legacy is a material
 16 issue in this case and is related to the veracity of numerous representations by Paton to the
 17 BCPF Board and its accountants regarding his role at Legacy. Contrary to what Paton claims,
 18 the trustee does claim he misrepresented his ownership of Legacy and that he was partially
 19 retired. Thus the circumstances surrounding his claimed retirement and the timing and
 20 formation of trusts and other devices he has utilized are material to the case. That those
 21 materials may also be relevant to Mr. Paton’s credibility does not relieve Paton of the
 22 obligation to provide responses.

23 Despite the existence of the fraudulent transfer cause of action and relevance to the
 24 representations Paton made to the BCPF Board, the Paton Defendants continue to refuse to
 25 answer discovery requests directed toward these issues. The Trustee requests the Court to
 26
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1 overrule the objections finding that these inquiries are not improper supplemental proceedings
2 and enter an order compelling the Paton defendants to provide full and complete responses.

3 DATED this 3rd day of August, 2016.
4

5 s/ Scott B. Henrie
6 s/ Manish Borde
7

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27 PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO
MOTION TO COMPEL DISCOVERY FROM DEFENDANTS
CLARK NUBER AND THE PATON DEFENDANTS - 6
(C15-1914-RSL)

Williams, Kastner & Gibbs PLLC
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Seattle, Washington 98101-2380
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

Bankruptcy Withdrawal of Ref (SEA)
ECFHelp_Seattle@wawb.uscourts.gov

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PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO
MOTION TO COMPEL DISCOVERY FROM DEFENDANTS
CLARK NUBER AND THE PATON DEFENDANTS - 7
(C15-1914-RSL)

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DATED this 3rd day of August, 2016.

s/ Scott B. Henrie

s/ Manish Borde

Scott B. Henrie, WSBA #12673

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PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO
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CLARK NUBER AND THE PATON DEFENDANTS - 8
(C15-1914-RSL)

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